

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

\* \* \*

TARA ANN SHERWIN, ) 2:11-cv-00043-APG-GWF  
Plaintiff, )  
vs. ) **ORDER**  
INFINITY AUTO INSURANCE COMPANY, )  
DOES I – X, and ROE CORPORATIONS I – )  
X, inclusive, )  
Defendant. )

Before the court is Defendant Infinity Auto Insurance Co.'s Motion for Partial Summary Judgment Regarding Plaintiff's Second, Third, Fourth and Fifth Causes of Action and Claim for Punitive Damages (Dkt. 138). Based on the following reasons, this court GRANTS Defendant's Motion for Partial Summary Judgment.

## **BACKGROUND**

On March 31, 2009, Plaintiff Tara Ann Sherwin was involved in a two-car motor vehicle accident. (Dkt. 15.) Plaintiff was struck by a car driven by Manuel Flores-Rubio. (Dkt. 141.) Plaintiff sustained “injuries to her shoulders, back, bodily limbs, organs and systems.” (Dkt. 15.) On April 2, 2009, Plaintiff visited Dr. Jacob Steckel, a chiropractor, who prescribed a treatment plan for her injuries. (Dkt. 90-9.) On June 9, 2009, Plaintiff visited Dr. Andrew Cash, a surgeon, who recommended surgery for Plaintiff’s disk extrusion. (Dkt. 90-12.) Dr. Steckel’s July 17, 2009 report indicated that Plaintiff did not want surgery, and was not currently experiencing

1 undue symptoms. (Dkt. 90-11.) Dr. Steckel's final report, dated October 7, 2009, reported  
2 Plaintiff was symptom-free. (Dkt. 90-10.)

3 Flores-Rubio's insurance policy provided \$15,000 in liability coverage per person. (Dkt.  
4 141.) Plaintiff presented a claim to Flores-Rubio's insurance carrier, and on January 7, 2010, she  
5 accepted his \$15,000 policy limit to settle that claim. (Dkt. 90.) Plaintiff was covered by an  
6 insurance policy issued by Defendant Infinity Auto Insurance Company ("Infinity"), which  
7 provided Uninsured/Underinsured Motorist ("UIM") coverage in the amount of \$15,000 per  
8 person. (*Id.*) On December 30, 2009, Plaintiff demanded that Infinity pay the \$15,000 limit on  
9 her UIM coverage; Plaintiff demanded payment within ten days. (Dkt. 90.) Around January 4,  
10 2010, Infinity's adjustor, Justin Gaiser, reviewed Plaintiff's claim and prepared a report.  
11 Gaiser's report did not mention Dr. Cash's surgical recommendation, and the parties dispute  
12 whether Gaiser considered that recommendation in his assessment of Plaintiff's claim. (Dkt. 141  
13 at Exhibit 1-J.) After reviewing Gaiser's report, Infinity's claims manager Christy Ragland  
14 placed a total value on Plaintiff's claim of \$18,183. (Dkt. 141 at Exhibit 1-H.) She based that  
15 amount on the medical expenses Plaintiff had incurred plus general damages of \$6,500.

16 On January 6, 2010, Infinity offered Plaintiff \$3,183, which was Infinity's calculation of  
17 Plaintiff's claim minus the \$15,000 she received from the tortfeasor's insurer. (Dkt. 90.)  
18 Plaintiff refused the offer. (*Id.*) Through counsel, Plaintiff protested that Infinity failed to  
19 consider the recommendation of Plaintiff's surgeon, and demanded the full limit of the UIM  
20 policy. (Dkt. 90-15.) Infinity told Plaintiff that she could keep the \$3,183 without signing a  
21 release, and that Infinity would hold the claim open until she either submitted further  
22 documentation of the need for surgery, or saw a doctor recommended by Infinity for a second  
23 opinion about her back issue. (Dkt. 90-17.)

24 Plaintiff agreed to see one of the three doctors recommended by Infinity, Dr. Anthony B.  
25 Serfustini. Dr. Serfustini determined that Plaintiff's back injury likely was preexisting at the  
26 time of the accident, that a portion of her chiropractic treatment had been unnecessary, and that  
she did not require surgery. (Dkt. 90-21.)

1 Plaintiff sued Infinity on August 4, 2010 in Nevada state court. (Dkt. 1.) Infinity  
 2 removed the case to this court. (*Id.*) Plaintiff asserts claims for (1) breach of contract, (2)  
 3 contractual breach of the implied covenant of good faith and fair dealing, (3) tortious breach of  
 4 the implied covenant of good faith and fair dealing, (4) bad faith, and (5) unfair trade practices in  
 5 violation of NRS 686A.310. Infinity's present motion seeks Partial Summary Judgment on the  
 6 second, third, fourth, and fifth claims, and Plaintiff's claim for punitive damages.

## 7 DISCUSSION

### 8 A. Rule 56 Legal Standard

9 The purpose of summary judgment is to avoid unnecessary trials when there is no dispute  
 10 as to the material facts before the court. *Northwest Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18  
 11 F.3d 1468, 1471 (9th Cir. 1994.) Summary judgment is proper if the evidence shows that there  
 12 is no genuine issue as to any material fact and the moving party is entitled to judgment as a  
 13 matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).  
 14 Because summary judgment allows a court to dispose of factually unsupported claims, the court  
 15 construes the evidence in the light most favorable to the nonmoving party. *Bagdadi v. Nazari*, 84  
 16 F.3d 1194, 1197 (9th Cir. 1996). Where there is a complete failure of proof concerning an  
 17 essential element of the nonmoving party's case, all other facts are rendered immaterial and the  
 18 moving party is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 323. Summary  
 19 judgment is not a disfavored procedural shortcut, but an integral part of the federal rules. *Id.*

### 20 B. Analysis

#### 21 1. Second, Third, and Fourth Claims: Bad Faith

22 "An insured may institute a bad faith action against his or her insurer once the insured  
 23 establishes 'legal entitlement' to an uninsured or underinsured motorist policy and unreasonable  
 24 conduct by the insurer concerning its obligations to the insureds." *Drennan v. Maryland Cas.*  
 25 *Co.*, 366 F. Supp. 2d 1002, 1005–1006 (D. Nev. 2005) (citing *Pemberton v. Farmers Ins. Exch.*,  
 26 858 P.2d 380, 384 (Nev. 1993)). An insured has shown "legal entitlement" when the insured "is  
 able to establish fault on the part of the uninsured motorist and the extent of the insured's

1 damages.” *Id.* “An insured is not required to obtain a judgment against the tortfeasor before he is  
 2 entitled to receive proceeds under a UIM policy.” *Id.* Nevada law has not outlined a specific  
 3 standard for determining whether an insured has established the extent of the insured’s damages.  
 4 *Drennan*, 366 F.Supp.2d at 1006.

5 A claim of breach of the covenant of good faith and fair dealing is, in essence, a claim for  
 6 bad faith. Insurers have a special relationship with their insureds that arises under the implied  
 7 covenant of good faith and fair dealing. *Allstate Insurance Co. v. Miller*, 212 P.3d 318, 324  
 8 (Nev. 2009). This duty does not arise out of contract, but rather the covenant is imposed on  
 9 insurers by law. *U.S. Fidelity & Guaranty Co. v. Peterson*, 540 P.2d 1070 (Nev. 1975). “A  
 10 violation of the covenant gives rise to a bad-faith tort claim.” *Miller*, 212 P.3d at 324. Bad faith  
 11 is “an actual or implied awareness of the absence of a reasonable basis for denying benefits of  
 12 the [insurance] policy.” *Id.* (quoting *Am. Excess Ins. Co. v. MGM*, 729 P.2d 1352 (Nev. 1986)).

13 In order to establish a claim for bad faith in the present context, plaintiffs must establish  
 14 that (1) her claim was denied, (2) the denial was unreasonable, and (3) the insurer knew it lacked  
 15 a reasonable basis to deny the claim, or acted with reckless disregard as to the unreasonableness  
 16 of the denial. *See Schumacher v. State Farm Fire & Cas. Co.*, 467 F. Supp. 2d 1090, 1096 (D.  
 17 Nev. 2006); *Pemberton*, 858 P.2d at 382 (“An insurer fails to act in good faith when it refuses  
 18 ‘without proper cause’ to compensate the insured for a loss covered by the policy.”).

19 Infinity suggests that Plaintiff cannot assert bad faith because Infinity did not deny her  
 20 claim; rather, because Infinity paid a portion of her claim, the claim was not denied. Infinity  
 21 relies upon language in *Schumacher* stating that “State Farm did not deny the claim, it just paid a  
 22 different value than Schumacher requested. Under the reasoning of *Pioneer [Chlor Alkali  
 23 Company, Inc. v. National Union Fire Insurance Company*, 863 F.Supp. 1237, 1244  
 24 (D.Nev.1994)], this makes the complaint more of one based upon statutory violations of NRS  
 25 686A.310 than it does a bad faith action.” 467 F. Supp. 2d at 1096. This Court will not extend  
 26 *Schumacher* to hold that any payment on a claim—even a nominal payment—avoids a finding of  
 a denial of the claim, thereby insulating the insurer from bad faith liability. Such a holding

1 might encourage insurers to pay only nominal damages in many cases simply to avoid a bad faith  
 2 claim. Regardless, in the present case the first prong of the *Schumacher* bad faith test is satisfied  
 3 because Infinity denied the additional amounts Plaintiff demanded under the policy.

4 Even though the claim was denied, a bad faith claim is subject to summary judgment “if  
 5 the defendant demonstrates that there was a genuine dispute as to coverage.” *Feldman v. Allstate*  
 6 *Ins. Co.*, 322 F.3d 660, 669 (9th Cir. 2003.) “The key to a bad faith claim is whether or not  
 7 denial of the coverage was reasonable.” *Id.* at 669. Accordingly, if the insurer had a reasonable  
 8 basis to deny coverage, there can be no finding of bad faith. *Pioneer*, 863 F. Supp. at 1242.

9 Plaintiff has not presented sufficient evidence to support a finding that Infinity had no  
 10 reasonable basis to deny coverage, and that Infinity knew it had no reasonable basis to deny  
 11 coverage. Plaintiff’s medical records reflected inconsistent recommendations and intentions  
 12 regarding her condition and the potential for surgery. Her chiropractor, Dr. Steckel, wrote on  
 13 July 17, 2009 that Plaintiff was not currently experiencing any undue symptoms and did not want  
 14 surgery. (Dkt. 90-11.) His final report, dated October 7, 2009, stated that Plaintiff was symptom-  
 15 free. (Dkt. 90-10.) Infinity offered Plaintiff the chance for a second opinion from Dr. Serfustini,  
 16 who ultimately opined that surgery and further treatment was unnecessary. Infinity was not  
 17 unreasonable in offering Plaintiff less than the full amount of the policy. Although Plaintiff feels  
 18 entitled to the remainder of the UIM policy limit because her surgeon recommended a costly  
 19 surgery, this entitlement does not render the \$3,183 already tendered—20% of the UIM policy  
 20 limit—a bad faith denial of her claim. Thus, Infinity is entitled to summary judgment on  
 21 Plaintiff’s claims asserting bad faith.

## 22                   2. Fifth Claim: Unfair Trade Practices

23 Plaintiff also alleges a cause of action under NRS 686A.310 for Infinity’s alleged failure  
 24 to properly settle Plaintiff’s insurance claim. (Dkt. 15, ¶ 50.) NRS 686A.310 addresses the  
 25 manner in which an insurer handles a claim whether or not the claim is denied. *Schumacher*, 467  
 26 F. Supp. 2d at 1095. Claims of unfair trade practices and bad faith are not identical causes of  
 action. *Id.* The applicable section of the statute prohibits “[f]ailing to effectuate prompt, fair and

1 equitable settlements of claims in which liability of the insurer has become reasonably clear.”

2 NRS 686A.310(e).

3 As discussed above, Infinity’s liability to pay the balance of the policy limit is not  
 4 reasonably clear. Plaintiff promptly paid \$3,183 under the policy, based upon its calculation of  
 5 Plaintiff’s damages. Whether Plaintiff is entitled to any additional amount is a disputed question  
 6 of fact for the jury, and is the crux of Plaintiff’s breach of contract claim. Because it is not  
 7 reasonably clear that Infinity is liable to pay more under the policy, Plaintiff’s allegations do not  
 8 support a claim of Unfair Trade Practices under NRS 686A.310. Infinity is entitled to summary  
 9 judgment on this claim.

10 **3. Punitive Damages**

11 Plaintiff admits that if her only remaining claim is for breach of contract, she is not  
 12 entitled to punitive damages. Because the Court has disposed of all other claims, Infinity is  
 13 entitled to summary judgment on Plaintiff’s demand for punitive damages.

14 **C. Remand**

15 Infinity petitioned to remove this case based on diversity jurisdiction. The federal district  
 16 courts have original jurisdiction when the parties are of diverse citizenship and the amount in  
 17 controversy, exclusive of interest and costs, exceeds \$75,000.00. 28 U.S.C. § 1332(a).

18 This court is obligated to consider, *sua sponte*, whether it has subject matter jurisdiction.  
 19 *Allstate Ins. Co. v. Hughes*, 358 F.3d 1089, 1093 (9th Cir. 2004). Because Plaintiff is now  
 20 limited to her breach of contract claim, recoverable damages in this matter do not meet the  
 21 \$75,000 threshold for diversity jurisdiction. Accordingly, this court no longer has subject matter  
 22 jurisdiction, and must remand this case to state court for all further proceedings.

23 **CONCLUSION**

24 The court hereby **GRANTS** Infinity’s Motion for Partial Summary Judgment regarding  
 25 Plaintiff’s second, third, fourth, and fifth claims, and claim for punitive damages. Judgment is  
 26 entered in Infinity’s favor on those claims.

Because the remaining claim fails to satisfy the amount in controversy required for this court to have jurisdiction, this case is hereby **REMANDED** to the state court from which it was removed.

DATED this 31st day of October, 2013.

**ANDREW P. GORDON**  
**UNITED STATES DISTRICT JUDGE**